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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), et al.,
Petitioners,

v.

BRIDGET C. MERGENS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF DR. DAVID MOSHMAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

David Moshman, Ph.D., is a professor of educational psychology at the University of Nebraska-Lincoln. Dr. Moshman is an authority on adolescent psychology with a special focus on the First Amendment rights of children. He is the author of *Children, Education, and the First Amendment* (1989), editor of *Children's Intellectual Rights* (1986) and author, with John Glover and Roger Bruning, of *Developmental Psychology* (1987).

Based upon his extensive research on the subject of children and the First Amendment, Dr. Moshman has come to the conclusion that secondary school-age children are quite competent to understand that schools are not condoning a particular religion by allowing a student initiated Bible study club to meet on school grounds. In fact, it is Dr. Moshman's view that children, at least of high school age, have a constitutionally-protected right to meet on school grounds and discuss, on a voluntary, extracurricular basis, religious topics.

QUESTION PRESENTED

I. ARE SECONDARY STUDENTS RELEVANTLY DIFFERENT FROM COLLEGE STUDENTS IN THEIR ABILITY TO UNDERSTAND THAT A SCHOOL POLICY ALLOWING STUDENT INITIATED BIBLE STUDY CLUBS TO MEET ON CAMPUS DOES NOT SUGGEST STATE APPROVAL OF THE RELIGIOUS GROUP?

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STATEMENT OF THE CASE

Amicus curiae adopts the factual presentation set forth in Respondent's Statement of the Case.

Counsel of Record for the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

SUMMARY OF ARGUMENT

Public high school students are able to understand that voluntary student initiated Bible club meetings held at their school do not imply that the state is endorsing religion in general or the particular religious groups it allows to meet.

ARGUMENT

A. THE SUPREME COURT HAS DETERMINED THAT A PUBLIC UNIVERSITY'S REFUSAL TO ALLOW RELIGIOUS GROUPS TO USE SCHOOL MEETING FACILITIES ON THE SAME BASIS AS OTHER GROUPS IS A VIOLATION OF THE FREE SPEECH CLAUSE.

This Court has determined that religious groups must be allowed to meet on public university campuses on the same basis as other organizations. *Widmar v. Vincent*, 454 U.S. 263 (1981). It is well-established that when government makes a forum available for a wide variety of expressive activities by private persons content-based exclusions from the use of such a forum are constitutionally suspect and subject to strict First Amendment scrutiny. *See e.g., Chicago Police Department v. Mosley*, 408 U.S. 92 (1972), *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). Religious discussion and worship are "forms of speech and association protected by the First Amendment." *Widmar*, 454 U.S. at 269.

This Court concluded in *Widmar* that a public university's refusal to allow religious groups to use the Student Union on

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Counsel of Record for the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

the same basis as other groups was a violation of the student's freedom of speech. The university's argument that it must protect students against perceiving government endorsement of religion was specifically rejected by the Court. *Widmar*, 454 U.S. at 448-451. The Court based this finding, at least in part, upon the maturity of college students. In a seminal footnote the Court held:

> "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion . . . *See Tilton v. Richardson*, 403 U.S. 672 at 685-686 (1971). In light of the large number of groups meeting on campus . . . we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place. *Id.* at 275.

The concern expressed by the Court in the *Widmar* "impressionability footnote" is that young children observing student-initiated religious study groups meeting at their school might infer that the school was endorsing religion in general or the particular religious groups allowed to meet. This Court and Justice Powell, author of the *Widmar* footnote, have retreated from the implication that students under college age may not be able to appreciate a school's policy of neutrality toward religion. Justice Powell, specifically rejecting the inference in *Widmar* that younger students may be more impressionable than their college age counterparts, states in his dissent to *Bender v. Williamsport Area School District*, 475 U.S. 534, 559 (1986):

We did note in *Widmar* that university students are "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion". *Widmar* at 274, n.14.

Other decisions, however, have recognized that the First Amendment rights of speech and association extend also to high school students. *See, e.g., Board of Education, Island Trees Union Free School v. Pico*, 457 U.S. 853, 864, 102 S.Ct. 2799, 2806, 73 L.Ed. 2d, 435 (1982) (opinion of Brennan, J.); *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506-507, 80 S.Ct. 733, 736, 21 L.Ed. 2d, 731 (1969) (citing cases). I do not believe — particularly in this age of massive media information — that the few years difference in age between high school and college students justifies departing from *Widmar*.

B. CONGRESS CONSIDERED THE MATURITY OF SECONDARY SCHOOL STUDENTS IN ENACTING THE EQUAL ACCESS ACT.

The Equal Access Act, 20 U.S.C. §§ 4071 - 4074 (1984), makes it unlawful to deny equal access to students in public secondary schools who wish to meet voluntarily for religious purposes. By enacting the Equal Access Act, Congress extended the *Widmar* holding, requiring equal access on university campuses, to secondary schools. In deciding to mandate equal access for religious groups on high school campuses, Congress considered the maturity of secondary school students and concluded that they were not relevantly different from college students.

Congress noted, in the legislative history of the Act, various Supreme Court decisions recognizing that high school students have protected First Amendment rights of free speech and association even when that speech is of a religious nature.[1] For instance, in *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969), a high school student's right to wear a black armband protesting the Vietnam War was upheld despite the clear religious and political overtones of the gesture. Similarly in *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982), this Court held that secondary school students were able to view explicit materials contained in school library books without concluding that the school adopted or approved of the views presented in the materials.

The ability of high school students to exercise independent judgment has been frequently noted by the courts:

> the court can take judicial notice of the progressively higher levels of intellectual and emotional development of students in the latter grades of secondary schools. As a result, more deference should be shown school authorities' curricular decision regarding grade schools, and perhaps junior high school students, in the face of a challenge that a particular point of view has been excluded. High school students, in contrast, are at an age approaching both adulthood and franchise. As the Second Circuit has noted in a related context, "it would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must

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[1] S. Rep. No. 357, 98th Cong. 2d Sess. 34-45 (1984).

play an essential role in preparing their students to think and analyze and to recognize the demagogue".[2]

High school students are capable of hearing various forms of expression without attaching a school endorsement of the form of expression. *See generally, Tinker*, 393 U.S. at 511 (students are not "closed circuit recipients of only that which the State chooses to communicate"). This Court has held that students are capable of understanding that the study of the Bible as history or literature in public school courses does not lead to an inference of state endorsement of religious teachings. *School District of Abington Township v. Schempp*, 374 U.S. 203 at 225 (1963). In *Zorach v. Clauson*, 343 U.S. 306, 311 (1952), this Court held that released time programs for religious instruction during the school day did not carry the imprimatur of state approval of religion.

Since students are capable of understanding that allowing forms of political or religious protest does not connote state involvement or approval (*see Tinker*), that placement of explicit and controversial materials in a school library does not indicate state approval or agreement with those materials (*see Pico*), and that the state's permission for students to leave school grounds

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[2] *Seyfried v. Walton*, 668 F.2d 214, 219-20 (3d Cir. 1981); (Rosenn, J., concurring) (footnote). *See also, Russo v. Central School District No. 1.*, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied.*, 411 U.S. 932 (1973) (teacher's refusal to lead flag salute would not have a destructive effect on students); *James v. Board of Education*, 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972); *Bayer v. Kinzler*, 383 F.Supp. 1164 (E.D.N.Y 1974), *af'd. mem.*, 515 F.2d 504 (2d Cir. 1975) (striking down restriction on information about contraception and abortion published in school newspapers); *Wilson v. Chancellor*, 418 F. Supp. 1358 (D.Or. 1976) (school ban on political speakers during high school classes struck down). *See also*, S. Rep. No. 357, 98th Cong. 2d Sess. 35 (1984).

for religious instruction does not indicate state support of that particular religion (*see Zorach*), then high school students should be credited with the ability to understand that by allowing a religiously-oriented group to meet on school grounds in the same manner as other organizations, the state does not endorse that religious group.

Students of high school age are currently bestowed with many rights of an adult nature. This Court has repeatedly recognized that high school students are confronted with many adult situations and are entitled to exercise their independent judgment concerning those situations. A mature minor may currently decide to have an abortion without parental notification or state consent. See *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). Statutory prohibitions against the sale of contraceptives to minors have been held unconstitutional, thus allowing high school students to make decisions concerning birth control. *Carey v. Population Services International*, 431 U.S. 678 (1977). If students of high school age are capable of and entitled to making the important decisions listed above, they are certainly capable of distinguishing state neutrality from state support of a student initiated Bible study group.

The courts have held with consistency that secondary school students are remarkably insightful and are able to hear varied sources of information without perceiving those views as having their school's endorsement. The courts have noted with regularity the "surprisingly sophisticated, intelligent, and discerning" nature of high school students. *Wilson v. Chancellor*, 418

F.Supp. 1358, 1368 (D.C. Or. 1976).[3] The Eighth Circuit, in reversing the district court in this case, determined that Congress considered any differences in maturity between university students and secondary students before enacting the Equal Access Act.[4]

C. COMPULSORY ATTENDANCE LAWS ARE NOT A VALID REASON FOR DENYING EQUAL ACCESS TO VOLUNTARY STUDENT INITIATED RELIGIOUS GROUP MEETINGS.

The issue of compulsory attendance laws has been raised as a reason to deny access to religious groups seeking to meet

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[3] In upholding a guest speaker's right to address the issue of communism, the *Wilson* court noted that hight school students were not susceptible to adopting the speaker's views as those of the school. *See also, Seyfried v. Walton*, 668 F.2d 214, 219 (3d Cir. 1981) (Rosenn, J., concurring) ("the Court can take judicial notice of the progressively higher levels of intellectual and emotional development of students in the later grades of secondary school"); *Koppell v. Levine*, 347 F.Supp. 456, 464 (E.D.N.Y. 1972) (recent "legislation, judicial decisions and evolving social attitudes" have altered traditional views of students rights).

[4] *Mergens v. Board of Education of Westside Community Schools*, 867 F.2d 1076, 1080 (8th Cir. 1989). The argument that less mature high school students are likely to confuse equal access policy with state sponsorship of religion was explicitly rejected by the Senatorial Committee on the Judiciary in its report of the Equal Access Act:

> Authors writing in the leading legal periodicals have considered the issue and agree that students below the college age can understand that an equal access policy is one of State neutrality toward religion, not one of State favoritism. S. Rep. No. 357, 98th Cong. 2d Sess. 8 (1984).

on secondary school grounds.[5] This reasoning is based on the false assumption that "compulsory attendance laws transform all extracurricular student meetings into coercive activities".[6]

Even if club activity takes place during compulsory attendance hours, the existence of a compulsory attendance law does not compel a student to attend a voluntary club meeting. Voluntary student activity during or outside of school hours is not a mark of state sponsorship.[7] As stated in the legislative history of the Equal Access Act, "the concern with school hours is connected with the Court's concern that the State, through its compulsory attendance laws, is providing a 'captive audience' for any such voluntary religious activity. This fear is, of course, groundless in the case of truly voluntary student initiated, religious activities at any time, and demonstrably so before or after school hours, since students are not even required to be on school property at these times."[8]

D. WITH RESPECT TO GENERAL INTELLECTUAL DEVELOPMENT, ADOLESCENTS ARE MORE LIKE COLLEGE STUDENTS AND ADULTS THAN LIKE YOUNG CHILDREN.

Psychological research strongly suggests that, with respect to basic cognitive maturity, adolescents are more like college

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[5] See *Brandon v. Board of Education of the Guilderland Central Schools*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

[6] Brief for the Christian Legal Society as *Amicus Curiae* Supporting Respondents in *Bender v. Williamsport Area School District, et al.*, No. 84-773.

[7] *Tinker*, 393 U.S. at 511.

[8] S. Rep No. 357, 98th Cong. 2d Sess. 9 (1984).

students and adults than like younger children. Research on intellectual development comprises thousands of published studies involving hundreds of thousands of individuals ranging in age from birth through adulthood. Such individuals have been assessed in a wide variety of ways with respect to their understanding of various abstract concepts and their ability to engage in a variety of forms of deductive, inductive, and moral reasoning.[9] Children aged 9 or 10 commonly fail to grasp concepts that are spontaneously understood or easily learned by college students. The younger children show systematic and persistent errors in reasoning that are rare or easily correctable in adults. Beginning around age 10 to 12, on the other hand, mature reasoning is often found and differences from adult reasoning can usually be eliminated with brief instruction or feedback.[10]

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[9] See, M.D.S. Braine & B. Rumain, *Logical Reasoning*, 3 *HANDBOOK OF CHILD PSYCHOLOGY*, 263 (p. Mussen, ed. 1983); D. Moshman, *CHILDREN, EDUCATION, AND THE FIRST AMENDMENT*, 62-91 (1989); D. Moshman, *The Development of Metalogical Understanding, REASONING NECESSITY, AND LOGIC* (W. Overton, ed. in press); D. Moshman & L.E. Lukin, *The Creative Construction of Rationality, HANDBOOK OF CREATIVITY* 183 (J. Glover, R. Ronning, C. Reynolds, eds. 1989); D.P. O'Brien, *The Development of Conditional Reasoning*, 20 *ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR* 61 (H. Reese, ed. 1987).

[10] See e.g., D. Moshman, *Development of Formal Hypothesis-Testing Ability*, 15 DEVELOPMENTAL PSYCHOLOGY 104 (1979); D. Moshman & B.A. Franks, *Development of the Concept of Inferential Validity*, 57 CHILD DEVELOPMENT 153 (1986); W. Overton, S. Ward, S. Noveck, I. Black & D. O'Brien, *Form and Content in the Development of Deductive Reasoning*, 23 DEVELOPMENTAL PSYCHOLOGY 22 (1987).

Adolescent reasoning is far from perfect, of course, but so is that of adults.[11] To the extent that adolescents deviate from standards of rationality, their deviations are of the same sort commonly found in adults. Differences between the average adolescent and the average adult are relatively small compared to the variability within each group. The sort of clear, qualitative differences from adult reasoning that might justify a sharp legal distinction are simply not found beyond the age of about 10 or 11.[12]

Theories of cognitive development are generally consistent with this picture. The evidence that a level of cognition comparable to that of adults is typically reached about age 11 or 12 is consistent with the classic research of Jean Piaget, the child psychologist whose theory postulates that the stage of formal operations, the culmination of cognitive development, is achieved at this age.[13] Although some aspects of Piaget's theory have been questioned, the idea that the transition to a level of abstraction typical of adult reasoning occurs no later than

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[11] J. Evans, *THE PSYCHOLOGY OF DEDUCTIVE REASONING* (1982); J. Evans, *THINKING AND REASONING: PSYCHOLOGICAL APPROACHES* (1983).

[12] D. Moshman, *CHILDREN, EDUCATION AND THE FIRST AMENDMENT* at p. 78; D. Moshman, *Equal Access for Religion in Public Schools? An Empirical Approach to a Legal Dilemma*, 9 DEVELOPMENTAL REVIEW (in press).

[13] B. Inhelder & J. Piaget, *THE GROWTH OF LOGICAL THINKING* (1958); see also J. Byrnes, *Formal Operations*, 8 DEVELOPMENTAL REVIEW 66 (1988).

age 11 or 12 has been maintained in the major current theories.[14]

E. AN ANALYSIS OF THE INTELLECTUAL DEMANDS OF UNDERSTANDING AN EQUAL ACCESS POLICY PROVIDES NO BASIS FOR RECONSIDERING THE GENERAL CONCLUSION OF ADOLESCENT INTELLECTUAL COMPETENCE.

The key empirical issue in the present case is the ability of high school age students to understand the distinction between (a) voluntary student groups permitted to use school premises and (b) official school activities endorsed by the school. This distinction involves understanding the idea of a forum that is created by and physically included within the school but that is open to a variety of groups and ideas. The specific legal concept implicated here is the First Amendment principle that government must permit freedoms of belief, expression, and association,[15] and may not restrict such activity on the basis of the content of those beliefs, the content of what is expressed, or the types of people with whom one wishes to associate.[16]

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[14] R. Campbell & M. Bickhard, *KNOWING LEVELS AND DEVELOPMENTAL STAGES* (1986); R. Case, *INTELLECTUAL DEVELOPMENT* (1985); K. Fischer, *A Theory of Cognitive Development*, 87 PSYCHOLOGICAL REVIEW 477 (1980).

[15] First Amendment, United States Constitution. "While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly and petition." *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958).

[16] See, *Healy v. James*, 408 U.S. 169, 180 (1972); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Although there appears to be no research specifically examining the development of understanding First Amendment principles,[17] there have been many studies on the development of similarly abstract concepts. Most directly relevant, perhaps, is research on the ability consciously and systematically to distinguish form from content. In a representative recent study, students in grades 4, 7, and college were asked to sort and rank a variety of logical arguments.[18] The arguments varied in both form and content. The key issue was the students' ability to understand the concept of validity *i.e.*, whether the conclusion followed from the premises. Most college students spontaneously understood the concept of validity. Many seventh graders (ages 12-13) showed spontaneous understanding as well.[19] Fourth graders (ages 9-10), on the other hand, never showed spontaneous understanding of validity and rarely profited from additional guidance provided in follow-up studies.

In sum, a case can be made that children up to about age ten are qualitatively different from adults in that they are incapable of fully comprehending a variety of abstract concepts.

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[17] One recent survey did examine student perceptions of their high school's existing policies with respect to nonreligious student groups and asked the students to speculate about school attitude toward hypothetical student religious groups. The authors classified 66% of the students as having "perceived absolute neutrality" with respect to religion and only 2% as having "perceived no neutrality". L.F. Rossow & N.D. Rossow, *High School Prayer Clubs: Can Students Perceive Religious Neutrality?*, 45 EDUC. L. REP. 475 (1988).

[18] D. Moshman & B. Franks, *supra*.

[19] With brief instruction regarding the concept of validity provided in follow-up studies, seventh grade performance was statistically indistinguishable from that of college students. *Id.*

Adolescents, on the other hand, are likely spontaneously to use adult concepts. Even if the adult concept is novel to the adolescent, he or she can usually grasp and apply the concept after a brief explanation.[20] Available evidence does not support a sharp legal distinction between high school and college students. There is no reason to think that high school students will naively assume that all groups meeting in a school are thereby endorsed by the school or that they are encouraged to join all such groups. On the contrary, it seems likely that the students of Westside High School are sufficiently mature to grasp the voluntary nature of extracurricular activities even when some of those activities involve religion.

F. THERE IS LITTLE SUPPORT FOR THE VIEW THAT ADOLESCENT INTELLECTUAL COMPETENCE IS SERIOUSLY UNDERMINED BY EXTREME EMOTIONALITY OR SUSCEPTIBILITY TO SOCIAL INFLUENCE.

Popular myths hold that adolescence is a period of extraordinary emotional turbulence and instability and that adolescents unthinkingly accede to peer pressure on all matters. Psychological research has largely undermined these myths. Adolescents do face difficult developmental challenges, but so do children and adults. Adolescents often do rebel against (what they perceive as) unreasonable constraints, but so do children and adults. Some adolescents do have deep emotional problems, but so do some children and adults. There is general agreement among psychologists that adolescence does not routinely involve a unique level of stress and turmoil.[21]

[20] *Id.*

Similarly, there is little support for the view that adolescents are at the mercy of their peers or incapable of autonomous decision-making.[22] It is true that, compared to younger children, adolescents are less dependent on adults and more oriented toward their peers. But adults value and attend to their peers as well. Susceptibility to social influence is a general characteristic of human beings, not a unique trait of adolescents. There is little basis for the view that high school students are sharply distinct from college students or adults in their susceptibility to peer pressure or are impressionable to a degree that undermines earlier religious inculcation by parents or that threatens autonomous decision-making in the area of religious beliefs and values.

G. HIGH SCHOOL STUDENTS ARE LIKE COLLEGE STUDENTS IN THOSE PSYCHOLOGICAL CHARACTERISTICS RELEVANT TO PERMITTING EQUAL ACCESS FOR VOLUNTARY STUDENT RELIGIOUS GROUPS.

Hence, it appears that high school students are comparable to college students in their ability to understand the vol-

[21] C. Irwin, *ADOLESCENT SOCIAL BEHAVIOR AND HEALTH* (1987); J. Santrock, *ADOLESCENCE* (3rd ed. 1987); L. Steinberg, *ADOLESCENCE* (1985).

[22] J.P. Hill & G.N. Holmbeck, *Attachment and Autonomy during Adolescence*, 3 *ANNALS OF CHILD DEVELOPMENT* 145 (G. Whitehurst ed. 1986); C. Lewis, *Minors' Competence to Consent to Abortion*, 42 AM. PSYCHOLOGIST 84 (1987); A. Waterman, *IDENTITY IN ADOLESCENCE* (1985).

untary nature of extracurricular student religious groups and there is no evidence of social or emotional factors sufficient to undermine such understanding. Concerns about a perceived establishment of religion can be handled through explicit disclaimers and regulation of meeting times and places rather than through the more restrictive alternative of forbidding voluntary student religious groups.

In enacting the Equal Access Act, Congress extended the approach of *Widmar* to the secondary level but not to the elementary level. It thus recognized the impressionability of young children but decided that, with respect to equal access, a distinction should be made between children and adolescents rather than between adolescents and college students. This conclusion appears to be fully consistent with current psychological research.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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